

**THE LAW OFFICES OF
MICHAEL R. GARDNER, P.C.**

ATTORNEYS AT LAW
1150 CONNECTICUT AVENUE, N.W.
SUITE 710
WASHINGTON, D.C. 20036-4131
(202) 785-2628
FAX (202) 785-1504
e-mail mrgpc@aol.com

RECEIVED

JAN - 2 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 2, 2002

By Hand

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistrionix, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, DC 20002

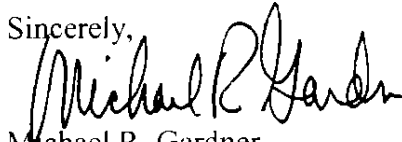
Re: Docket Nos.02-277, 01-235, 01-317 and 00-244

Dear Secretary Dortch:

On behalf of the Coalition for Program Diversity (CPD), enclosed please find an original and eighteen (18) copies of Coalition's Comments in this proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.



Kenneth Ziffren
Ziffren, Brittenham, Branca, Fischer, Gilbert-Lurie & Stiffelman LLP.

cc: Chairman Michael Powell
Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin
Commissioner Jonathan Adelstein
Susan Eid
Stacy Robinson
Jordan Goldstein
Alex Johns
Catherine Bohigian
Sarah Whitesell
Ken Ferree
Jane Mago

Before the
Federal Communications Commission
Washington, D.C.

RECEIVED

JAN - 2 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

2002 Biennial Regulatory Review) MB Docket No.02-277
)
Cross-Ownership of Broadcast Stations and Newspapers) MM Docket No.01-235
Rules and Policies Concerning Multiple Ownership) MM Docket No.01-317
of Radio Broadcast Stations in Local Markets)
)
Definition of Radio Markets) MM Docket No.00-244

COMMENTS BY
THE COALITION FOR PROGRAM DIVERSITY

Submitted by:

Kenneth Ziffren
Ziffren, Brittenham, Branca, Fischer, Gilbert-Lune & Stiffelman LLP.
1801 Century Park West
Los Angeles, CA 90067-6406
Phone: (310) 552-3388
Fax: (310) 553-7068

Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.
1150 Connecticut Avenue, N.W.
Suite 710
Washington, D.C. 20036
Phone: (202) 785-2828
Fax: (202) 785-1504

January 2, 2003

TABLE OF CONTENTS

	<u>Page</u>
Summary	i
I. Introduction.....	1
II. The Narrow Prime Time Television Programming Marketplace	6
III. The Advertising Marketplace for Prime Time Television Programming.....	11
IV. The Judicial Sustainability of the 25% Independent Producer Rule.....	28
V. The Public Interest and the 25% Independent Producer Rule.....	34
VI. Conclusion.....	38

Summary

The Coalition for Program Diversity¹ consists of leaders from the creative community and the U.S. advertising industry who share a deep concern about the diversity-chilling stranglehold that the four networks — ABC, NBC, CBS and Fox — currently have over the narrow prime time television programming marketplace.

The prime time television program marketplace is unique — and the programming it generates is particularly critical to the 43 million U.S. consumers who do not have cable or satellite services. Because of the importance of prime time television programming to the American viewing public, the Commission must take appropriate content neutral action by adopting a 25% Independent Producer Rule that will insure that the prime time programming aired by the four networks is as diverse as possible.

Diversity of sources — not the economic efficiencies that the networks currently fixate on — must be the Commission's primary goal as it analyzes the current prime time television programming marketplace. The Commission must address the troublesome reality that in the past decade, independent sources of diverse programming have been dramatically reduced as network deregulation prompted a tidal wave of vertical and horizontal mergers — resulting in massive media consolidation. A decade ago, 68% of prime time television aired by the four networks was produced by independent producers — while today, only 24% of the networks' prime time schedule is obtained

¹ The Coalition for Program Diversity, currently in formation, includes:

- **American** Federation of Television and **Radio Artists** (**AFTRA**) New York, NY;
- Carsey-Werner-Mandabach, LLC, Los Angeles, **CA**;
- Directors Guild of America (**DGA**) Los Angeles, **CA**;
- **Marian** Rees Associates, Inc., Studio City, CA;
- **MediaCom**, New York, NY;
- Screen Actors Guild of America (**SAG**), Los **Angeles**, CA;
- **Sony** pictures Television, Culver City, **CA**.

60m independent program sources.

This dramatic shrinkage in the independent sources of diverse prime time television programming is **further** exacerbated by the networks' current **overwhelming** reliance on in-house, lowest-budget possible programming. Today, the "best" programming chosen by the four network officials who dictate 100% of the prime time television schedule **often** is not the "best" in traditional **terms**. For consumers, network programming **often** is the cheapest, **most** **mainline** programming that network officials can simultaneously "rerun" (repurpose) **as** many times **as** possible on various network owned broadcast and cable platforms. **The** result: **maximum** profits for the networks' parents. not maximum program diversity for consumers.

As documented in Section II of this **brief**, due to deregulation in **the** 1990s, the four owners of the major networks have more than doubled the time and numbers of their prime time **programs**. Today the networks **air** only 17 hours of independent produced and owned programming on their weekly prime time schedules compared to **47.5** hours a decade ago. Moreover, in contrast to network claims of increased programming costs, the record confirms that the networks have decreased their programming expenditures **as a** percentage of revenues from 30.3% to **26.3%** over the past eight years. **This** drastic reduction in the sources and finding of diverse prime time television programming is aggravated by the networks bold and brazen negotiating tactics — tactics fostered by the unregulated environment in **which** the networks now operate with **impunity**.

To encourage investment in the prime time television programming marketplace — investment that will fuel the development of new **and** diverse programming — **the Commission must** adopt a First **Amendment** friendly **25%** Independent Producer Rule that **will** prevent the four major networks **from** extracting ownership rights from independent producers. Left unregulated, the **networks can** and routinely use their dominance to force independent producers **to** share "**backend**"

ownership rights. become a network “partner” or go “in-house.” Regardless of what option the independent producer succumbs to in order to get her or his creative product on prime time network television, the independent producers’ control of their program is lost — and the result is less diverse programming for the American public.

For the U.S. advertising industry — the essential economic engine of free television in the United States — the networks’ fixation of bottom line profits is restricting the ad industry’s ability to maximize its outreach to consumers. As confirmed in Section III, network induced blandness in programming for prime time television not only causes reduced audience size, it also triggers increased advertising costs: when the size of the viewing audience goes down, the cost of advertising as expressed by cost per thousand viewers (CPM) goes up. This cost increase ultimately is borne by the American public in higher prices paid for goods and services.

For network advocates who claim that programming in the Golden Age of Television during the 1970s and 1980s was generated by three networks — ABC, NBC and CBS, they overlook an important fact; during that era, the diverse genres of entertaining and often socially important network programming were produced by independent producers — not the networks who were required by federal regulations to obtain all of their programming from independent non-network sources.

For the four networks — who use auction-free analog and digital spectrum — their economic well-being will not be diminished by the Commission’s adoption of the 25% Independent Producer Rule; they will continue to enjoy exclusive control of all of the advertising revenues generated by 100% of their prime time schedules. The four networks would also be able to program 75% of their prime time schedule with their own programming. The balance of the networks’ prime time schedule — 25% — would be derived from a highly competitive marketplace-driven process

involving dozens of large and small independent producers who once again would have the realistic opportunity to develop and own programming aired on prime time television.

Regarding the sustainability of the content neutral **25% Independent Producer Rule**, the Commission has solid Court precedent to rely upon. As noted in Section IV, the Schurz Court was unequivocal in giving the Commission a judicial green light to adopt a carve out rule like the **25% Independent Producer Rule**. The Schurz Court confirms “the Commission could always take the position that it should carve out a portion of the production and distribution markets and protect them against the competition of the networks in order to foster, albeit at a higher cost to advertisers and ultimately to consumers, a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market would provide. That would be a judgment within the Commission’s power to make.”

The documentation provided by the Coalition for Program Diversity is unambiguous: the narrow prime time television programming marketplace has become dysfunctional as diverse sources of independently produced, non-network programming have been eliminated or seriously compromised by the unregulated major networks.

Based on the irrefutable record before it of the four networks’ anti-competitive and diversity-chilling dominance of the prime time television programming marketplace, the Commission should reject the major networks’ pleas for repeal of both the **35%** nationwide broadcast cap and the Dual Network Rule. Instead, the Commission should promote its fundamental goals of program diversity and competition in the prime time television marketplace by adopting the content-neutral **25% Independent Producer Rule** proposed by the Coalition for Program Diversity.

² Schurz Communications, Inc. v. FCC, **982 F.2d 1043**, 1049 (7th Cir. 1992).

Before the
Federal **Communications Commission**
Washington, **D.C.**

In *the* matter of

2002 Biennial Regulatory Review — Review of the) MB Docket No.02-277
Commission's Broadcast Ownership Rules and)
Other Rules Adopted Pursuant to Section 202 of)
the Telecommunications Act of 1996)
)
Cross-Ownership of Broadcast Stations and) MM Docket No.01-235
Newspapers)
)
Rules and Policies Concerning Multiple) MM Docket No.01-317
Ownership of Radio Broadcast Stations)
in Local Markets)
)
Defintion of Radio Markets) MM Docket No.00-244

To: The Commission

COMMENTS OF THE COALITION FOR PROGRAM DIVERSITY

I. INTRODUCTION

In *this* NPRM in this proceeding, the Commission acknowledged that it “has long regulated media ownership **as** a means of promoting diversity, competition and localism in the media without regulating the content of broadcast speech.”¹

The Commission further confirmed that its “ownership policies traditionally have focused on advancing three broadly defined goals: (1) diversity, (2) competition, and (3) **localism**.”²

¹ 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Docket No. 02-277, ¶ 2 (proposed **Sept. 23, 2002**).

² Id. at ¶ 5.

As the Commission undertakes the unprecedented challenge of reviewing all of its broadcast ownership rules, the Commission appropriately has committed to determining whether its regulatory Intervention is necessary to advance its fundamental goals of diversity, competition and localism in today's highly consolidated network broadcast marketplace.

Importantly, the Commission further acknowledged in its **NPRM** that the court in Fox Television, Inc. v. FCC recognized and highlighted the historical significance of diversity and localism in broadcast.⁷ The Commission, in fact, incorporated the language of the Fox Television decision in its **NPRM** stating "that in the context of broadcast regulation, the public interest has historically embraced both diversity and localism, that protecting diversity is a permissible policy for the agency to seek to advance...."⁴

With this Commission's explicit confirmation of its commitment to promoting diversity and competition in today's broadcast marketplace, and in view of the court's recent affirmation of the Commission's permissible pursuit of a pro-diversity policy, the Coalition for Program Diversity ("CPD")⁵ urges the Commission to adopt a First Amendment-friendly, content neutral rule that will

⁷ Fox Television, Inc. v. FCC, 280 F.3d 1027, 1042 (D.C. Cir. 2002).

⁴ 2002 Biennial Regulatory Review at ¶ 14 (citing Fox Television, 1280 F.3d at 1042).

⁵ The Coalition for **Program** Diversity, currently in formation, includes:

- American Federation of Television and Radio **Artists** (AFTRA), New York, NY (see Appendix A);
- Carsey-Werner-Mandabach, LLC, Los Angeles, CA,
- Directors Guild of America (DGA), Los Angeles, CA (see Appendix B);
- Marian Rees Associates, Inc., Studio City, CA;
- MediaCom, New York, **NY**;
- Screen Actors Guild of America (**SAG**), Los Angeles, CA (see Appendix C);
- Sony pictures Television, Culver City, **CA**.

provide the competitive opportunity for independent television producers to **gain** access for their diverse programming to **25%** of the network's prime time network television schedule.

In petitioning the Commission for creation of a **25%** prime time **television** rule for independently produced programming, the CPD documents the following **facts**:

- (1) Thenarrow, butcentically important, prime time television programming marketplace is overwhelmingly dominated by the four major U.S. broadcast networks — ABC, CBS, NBC and Fox. These FCC licensed giant broadcast corporations have been granted free analog and digital spectrum that ~~was~~ not secured, ~~as~~ with *other* FCC licensed services, through spectrum auctions. Instead. the networks, at no cost, enjoy **the** exclusive use of this enormously valuable spectrum — spectrum that is a public resource that will continue to increase significantly in value. Ironically, ~~while~~ these four networks currently control 100% of the prime time television schedule with their largely in-house produced programming, these same four networks, nonetheless, seek additional deregulatory relief from *the* Commission's 35% national broadcast cap so that they can expand their dominance over the ~~narrow~~ prime time programming marketplace — a marketplace that is critical to U.S. consumers +specially to the 43,411,000 consumers primarily dependent on ~~free~~ over-the-air advertiser supported television.⁶

- (2) The pnme time television programming marketplace **is a** narrow, unique market

⁶ See MEDIAMARK RESEARCH, INC., FALL 2002 REPORT (2002), Copyright 2002.

where programming from other video distribution sources **generally** cannot be substituted for prime time television programming. Notwithstanding the plethora **of** video outlets, the four networks' documented dominance of the current prime time television schedule results in **less** diversity of programming sources for U.S. consumers — not more. In this regard, while those advocating the repeal of the 35% cap often refer *to* the fact that “the Golden Age of Television” occurred during the 1970s and 1980s when there were only three networks, these proponents of further media consolidation ignore the fact that during this two decade period, the **networks** were required by FCC regulation to license all of their prime time television programming from independent producers.

- (3) Since the four broadcast networks and the major Hollywood **studios** were allowed to merge in the **mid-1990s**, the once thriving and fiercely competitive independent producer community has been dramatically diminished **as** a source of prime time television programming. A decade ago, 68% **of** prime time television programming aired by the four networks **was** produced by independent producers.⁷ Today, because **of** media consolidation, only 21% of the networks' prime time programming is obtained **from** independent producers.⁸ Moreover, because there are no regulatory

⁷ See Appendix F, (Coalition for Program Diversity Study (“CPD Study”), *1992-1993 TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, *Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season* (Sept. 1992))).

⁸ See Appendix D, (CPD Study, *2002-2003 TV Season Primetime Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER,

safeguards for independent producers in the highly concentrated ~~network-controlled~~ prime time television programming marketplace, ~~the~~ networks now freely ~~extract~~ back-end ownership rights from independent producers — producers ~~who~~ typically have little or no leverage to resist network demands ~~if~~ their programming ~~is to be~~ considered for the very limited opportunities to air on prime time television.

(4) The content neutral **25%** prime time regulatory carve out for independent producers proposed by the CPD will not only advance the Commission’s diversity and competition goals. it will also generate increased advertiser support for prime time television. ~~As~~ a result, the **25%** Independent Producer Rule will also promote enhanced competition in a more financially robust prime time television marketplace. Importantly, the **25%** Independent Producer Rule will not disadvantage the networks in terms of advertising revenues. In ~~fact~~, the networks would still enjoy exclusive control of all advertising revenues generated ~~from~~ their entire prime time schedule, including ad revenues resulting from the diverse independently produced programming aired during **25%** of the networks prime time schedule.

(5) The content neutral **25%** prime time regulation carve out rule is judicially sustainable. In fact, the 7th Circuit, in Schurz Communications, Inc. v. FCC, specifically supported a regulatory “carve out” ~~for~~ independent produced programming if the Commission determined in its judgement that such a regulation

Primetime Network Schedule **2002-2003**: Guide to the 2002-2003 Television Season (Oct. **2002**)).

would promote its goal of diversity in the television programming marketplace.⁹

- (6) Based on the documented paucity of programming sources for prime *time* television, the lack of diverse programming in the prime time television marketplace will **only** be exacerbated if the Commission grants the four networks relief from the **35%** cap or **relaxes** the Dual Network Rule. In any event, the Commission should provide the competitive opportunity for independent producers **to** once again showcase their diverse creative product during at least one quarter of **the** networks' prime time schedule. Appropriately mindful that the networks' lucrative prime time television schedule is dependent on the networks **free** use of analog and digital spectrum — spectrum that is a cherished public resource — the Commission must act **now** to advance its goals of program diversity and competition in the broadcast marketplace by requiring the networks to dedicate **25%** of their prime time schedule to programming produced by independent producers.

II. THE NARROW PRIME TIME TELEVISION PROGRAMMING MARKETPLACE

A. The Reality of Current Prime Time Television Programming Marketplace

Since the abolition of the financial interest, syndication and prime time access rules, the prime time marketplace has become bloated and consolidated. **As** the CPD Study **reveals**, *the* four owners of the major networks have more than doubled the time and number of programs - whether series, miniseries or one-shot - they own in prime time at **the** expense of independent producers **who**

⁹ Schurz Communications Inc. v. FCC, 982 F.2d 1043, 1049 (7th Cir. 1992).

now own only 17 hours on the four major network's weekly schedule.' Compare ~~this~~ number to the 47.5 hours that the independent producers owned just a decade ago." And the negotiating tactics have become more bold and brazen.

Initially, the networks demanded that the Term of their license on a series be increased from the traditional four seasons (five in the case of a Winter or Spring ~~start~~) to six or more **seasons**, and without offering the ~~supplier/packager~~ any increased license fees or other consideration. When some of the suppliers rebelled against such measures, the networks became even more strident. Henceforth, they announced or whispered that ~~virtually~~ all the series in prime time would have an extended or even perpetual Term and the network would own (1) a piece of the "action" (or backend) in consideration of ~~permitting~~ access to the network's airwaves, or (2) a "partner's" piece (50%). in consideration of which, the network would put up half the production deficit (but *not* half of the ~~term~~ deal cost for the major talent in question), or (3) the supplier should come "in house," so that the network or its affiliated production company would own **all** of the **copyright** in the show.

The supplier's equity would be converted from ownership to revenue sharing only ~~after~~ the network production company had recouped its (inflated) costs of distribution, production, financing, and overhead. Suppliers succumbed, unless they were historically in the production/distribution business **and** had access to public capital and had a popular series then on the **air**, which, coupled with their ability to derive continuing library income, ~~kept~~ them afloat. Companies independent from

¹⁰ See Appendix E, (CPD Study, *2002-2003 Network Primetime TV Ownership* Excluding *Theatrical/MOW* at 5, 12/10/02 (information compiled from **THE HOLLYWOOD REPORTER**, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002))).

¹¹ See Appendix G, (CPD Study, *1992-1993 Network Primerime TV Ownership* Excluding *Theatrical/MOW* at 3, 12/10/02 (information compiled from **THE HOLLYWOOD REPORTER**, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992))).

motion picture/television studios essentially gave up and either merged or went out of business. Even an entity as strong and well financed as Columbia/TriStar (now Sony Pictures Television) ceased production of new prime time series.

B. The Need For a 25% Independent Producer Rule

At the same time as the grabs by the networks for longer term and increased ownership, the networks put the brakes on funding the ever more expensive production costs of series. Where historically, through negotiation between relative equals during much of the 1970s and into the 1980s, the networks supplied greater than 70% of production costs, in the 21st century, networks are unwilling to fund over 60%, thereby creating deficits of as much as \$500,000 per episode for sitcoms and up to and over \$1 million an episode for an hour drama or action adventure show. An independent company, even those like Columbia/TriStar who has access to outside equity funding, could not keep pace, faced with increased deficits on the “front end” and with diminishing abilities to garner deficit recoupment from international sources, let alone domestic post-network exploitation.

To foster new investment in the prime time network business, it is essential to assist those who might wish to risk capital to have access to the network's airwaves, without being coerced through the newly developed post-FinSyn tactics.” Thus, after a short transition period, a major network (i.e., an over-the-air network with 95% or more NTI and with greater than a 4.0 Household Rating) would be required to order at least 25% of its prime time programming from an “Independent Producer(s).” This rule would add important and serious “voices” which presently are in danger of extinction because they do not own a major network. The Independent Producer could

¹² See *infra* at 15 for a brief discussion of FinSyn.

not effectively leverage a major network in any case OTHER THAN when it controls a valuable, popular **series** or other program, thereby benefitting the public and augmenting its stature. Diversity of source would be enhanced, competition would thrive, the public would be well-served.

C. The Definition of an Independent Producer Under the 25% Rule

An Independent Producer is defined **as** an entity other than one which is affiliated with a major network (**as** stated above). Under such a rule, a major network can order 75% of its prime time schedule (computed on a semi-annual basis) “in house” or from owner(s) of other major networks. And in computing the 25%, any time periods devoted to motion pictures initially theatrically released would not “count.” Thus, if a major network like NBC regularly scheduled two hours a week for theatrical motion pictures to be exhibited on its airwaves, the denominator in the equation would be 20, rather than 22, hours, so that five hours would have to be ordered and exhibited per week to meet the 25% Independent Producer Rule.

To be sure, some of the beneficiaries of this rule today would be the studios who do not own major networks, and one could well argue they need no incentive or help from the Government. But this overlooks the fact that non-studios, such as Carsey-Werner-Mandabach or Halmi (Hallmark) Productions would also be eligible and/or incentivized for investment and creativity, **as well as** the fact that new voices would likely grow and be heard in the future. And to assure their upside potential, the 25% Independent Producer Rule must also require that the network be barred from taking a financial interest or domestic syndication rights in the program, in order to qualify for the 25% set aside. Obviously, there is a quarter century of precedent for such rule. Otherwise, the separate and independent voice so necessary to achieve not only diversity of source but diversity of ideas would dissipate.

There is also the argument that cable networks and “weblets” should be treated like major networks and that these networks have reduced major network share and influence. However true **this** argument might have been in the Schurz case and era, the facts today **are** clear. The **programs** **on** the major networks’ dominate the ratings, not only in their initial exhibition window, but **thereafter**. No one can point to more than **a handful** of series - if any - which successfully ran in domestic syndication after initially airing on **a weblet** or cable network. Quality **is** quality, as seldom **as** achieved today, and **all** successful sitcoms aired on a major network to *start*.

Finally, one would **ask** why 25%, rather than 10% or 50% or other number? The proposed rule and percentage: (1) gives effect *to* a major network’s need or desire to produce in-house in quantities which could arguably achieve economies of scale, (2) **incent**s independent producers to stay in business, or perhaps more **importantly** start in the television production/distribution business with enough shots *to* be able to achieve success, and (3) it is a reasonable compromise between conflicting forces present in today’s marketplace. In reviewing the attached Appendices, one would readily discover that, if the rule were in effect today, NBC would already qualify and ABC would be “borderline” qualified. So, the proposed percentage could work today for two of the four major networks. To require less would effectively **disincent** newcomers from appearing on the prime time scene, let alone cause existing participants to be even more wary of their diminishing role (as was Columbia/TriStar).

III. THE ADVERTISING MARKETPLACE FOR PRIME TIME TELEVISION PROGRAMMING

A. The Advertising Industry's Potential to Advance the Commission's Goals of Program Diversity and Competition in the Prime Time Television Programming Marketplace

It is incumbent on the FCC to consider the advertising market and how it operates when changing broadcast regulation. The reason is quite simple; without an eye to the economic engine of the industry, there may be unintended consequences of regulatory change that are disruptive to the Commission's basic policy goals. This has happened to past Commissions in the case of Children's Television and the Prime Time Access Rule.

Conversely, an understanding of the advertising market can be used by the Commission to foster regulatory policies that will advance the Commission's policy goals of diversity and competition in the prime time television programming marketplace. In this area, the advertising industry directly helps the FCC achieve the three important Commission goals of competition, localism, and diversity in the broadcasting marketplace. The fact that the advertising market substantially helps maintain a thriving broadcast marketplace is best demonstrated by recent data that confirms that even in the weak advertising market from November 2001 through October 2002, advertisers spent \$11,198,814,000 on the six networks over-the-air prime time television programming alone."

Importantly, this advertising is placed by a wide range of advertisers for a diverse variety of products. During that same 12 month period, the prime time network advertising **was** placed by 682 different companies that advertised **3,478** different **brands**.¹⁴ Each of these brands **has** different sets

¹³ See COMPETITIVE MEDIA REPORTS, NOV. 2001 – OCT. 2002, Copyright Dec. 2002.

¹⁴ See NIELSEN MEDIA RESEARCH, Copyright 2002; NPower.

of potential and current consumers who have different tastes in television viewing. These differences vary dramatically between age, **sex**, income level, marital status, occupation, household size, geographic dispersion, education level, and language to attributes such as trend setting, active, worried, short of time, family oriented, adventurous, *et cetera*.

As the Commission regulates the television industry, it must fully appreciate the reality that advertisers need to market to our diverse Nation of consumers. Fundamental to the Commission's decision-making process is the overlapping and immediate concerns of both advertisers and American consumers who rely on free over-the-air television. It is imperative to the mission of free television that advertisers reach every household nationwide, regardless of income, race or culture. Importantly, the contrast between households that can afford to pay for cable and satellite subscriptions is staggering when compared with households that only have access to free advertiser supported network programming. Cable and Satellite households have a median income of \$51,375 while the 43,411,000 consumers who do not have this luxury have median incomes of \$26,588.¹⁵

Based on a purely economic analysis, broadcast advertising is essential for advertisers who must factor the necessary cost of broadcast advertising into the normal course of business. Thus, advertisers are not only impacted by changes in the broadcast industry, they must react to Commission decisions that ultimately impact consumer costs for products. Advertisers, and ultimately, American consumers, are significantly affected by FCC actions that at first glance, may seem outside the FCC's purview.

To understand how the Commission's actions – or lack of regulatory action, can impact the advertising industry as well as consumers, FCC officials must understand the fundamental workings

¹⁵ See id.

of the advertising industry. A primary reality is the fact that the advertising industry measures costs per thousand viewers (“cpm”). “Cpm” is defined as the desired audience viewing a program and thus watching the ad being run. Essentially, broadcasters charge advertisers per unit of advertising space divided by the number of viewers for that program. The “cpm” is thus affected by the price the broadcaster charges and changes with the size and makeup of the audience that watches the Program.

The broadcast industry presents an interesting economic situation. While the broadcaster typically owns and controls the makeup and presentation of a program, the broadcaster sells that program’s audience to advertisers. Although ownership of a program never leaves the broadcaster’s control, the final product of the program – the show itself – greatly affects the audience size and draw, and thus affects advertisers. As a result, when programs aired are bland, monotonous and similar in style, theme, and format (as has become the unfortunate pervasive reality of shows produced from the same source), advertisers become crippled in their ability to reach the widest variety of our Nation’s diverse population. Accordingly, the market suffers as the widest range of products fail to reach the most diverse range of the viewing public; and as a result prices, naturally, rise.

Thus, the regulatory environment’s effects on advertising costs of broadcast advertising per unit and its effects on the audience delivery of programming determines the advertiser’s cost of doing business; ultimately, it also impacts the American public’s cost of goods and services. This is both a problem and an opportunity for the Commission.

At times, due to the economic actions and reactions of the advertising marketplace, the FCC’s regulatory actions – or inaction – in one area have affected FCC policy in another. Prime

time network television has been a primary example of the problem in the past, yet it is an area where the Commission has a tremendous opportunity to advance its policy goals in the future.

Better programming attracts larger audiences. The FCC's OPP Working Paper 37 points out that "[t]he jump in subscription revenues for advanced analog and digital services attests to the value subscribers apparently place on expanded programming choice."¹⁶ It is obvious that the American public also puts a value on the degree of diverse programming choices provided by over-the-air television networks (although that value is paid to the networks on the viewers' behalf by advertisers.)

American viewers who depend on free broadcast television desire diverse television programming. While the Commission, in its Omnibus Broadcast Rulemaking, seeks to promote program diversity, it could inadvertently cause a deleterious impact on diversity unless the Commission gives appropriate consideration to all relevant aspects of the prime time programming marketplace. In this regard, based on the reality of cross-ownership today, the same companies are creating, producing and airing similarly themed shows in the prime time television marketplace. Because the networks own, operate and control these programming sources, the networks now are committed to generating profits from less diverse, lower rated programs — programs that immediately air on their co-owned cable affiliate. This "repurpose" of the same show has resulted in decreased diversity for a broader audience across both network broadcast and cable. Not only do advertisers and marketers suffer because of this drive to maximize profits by simultaneously utilizing as many venues owned by the networks to air the same programs, the American people also suffer

¹⁶ Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, OPP Working Paper Series 37, at 45 (Sept. 2002).

because advertisers cannot fully market diverse products in bland, monotonous programs. **Although** the recent FCC Study entitled Program Diversity and The Program Selection Process on Broadcast Network Television (“Study 5”) claims that diversity still exists in the current programming scheme, the substance of Study 5 proves **contradictory**.¹⁷

Under the Financial Interest Syndication Rule (the “FinSyn Rule”), networks licensed **programming** from producers (in essence, they rented the **raw materials** of their business) and the networks then sold the audience to *the* programs to advertisers. The networks realized handsome profits **as** they kept all advertising revenues **after** paying the rental to the producers generated **through** selling ad space. Importantly, in the FinSyn era, the network program executive’s primary job **was** to pick the “best” program and the best program typically was the independently produced program **that** attracted the largest or most saleable audience and delivered the highest margins.

In 1993 FinSyn sunsetted. Production studios - and independent producers who often collaborated with the studios - routinely became wholly owned divisions of vertically and horizontally integrated networks. In this new unregulated environment, the networks argued that they would always put on the “best” programming as the “. . . incentive [to use in-house produced programming] continues to be tempered by networks’ competing incentive to attract audiences by selecting the ‘**best**’ program irrespective of **source**.”¹⁸ Sadly **for** American viewers and advertisers, due to the deregulatory change in the economics of the prime time programming marketplace, the networks changed the meaning of the word “best.”

¹⁷ See Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on **Program** Diversity (Sept. 2002).

¹⁸ *Id.* at 3.

The new meaning of “best” is now driven by the networks’ desire for the largest possible profit margins across all airings of all network co-owned (as opposed to previously network rented) programming across all co-owned broadcast outlets. Study 5 lists many examples and quotes that prove this fundamental change in the industry, but perhaps the best was made by Ted Harbert, former President of ABC Entertainment responsible for selecting network programs, who is currently the President of NBC Studios:

Michael Eisner is saying okay ABC [and Disney] everybody just get together in the same room and do it together. I think their [Disney’s] shows will get on the air. That isn’t going to mean that they’re better. If you put the network person in charge of both sides of the fence, saying, ‘Okay, you’re in charge of the studio side and you also have to...choose the shows as the network person that go on the air.’ It’s impossible to ask the network person to have that much objectivity. To be able to look at the show they’ve been developing from the very, very beginning and say, ‘Oh, no what I’ve just been working on personally, that I’m personally invested in from the very first moment with the writer, gee that’s much lousier than the Warner Bnthers [sic] show. I’mgonnago with the Warner Brothers [sic] show.’ I just think it’s a virtually impossible thing to ask the people.”

In the early 1980s, John Kluge owned the Metromedia station group (now *Fox* Television). His creative and innovative programming strategy lowered his network costs by uniting other local stations to air the same program at the same time. He then could sell national advertisers commercials on a network basis, retain for local sale several of the commercial slots and substantially reduce the cost of programming at all of his stations. While his programming ideas failed to have traction in that market, his concept, nonetheless, remains viable today.

Today, the networks retain 100% of their advertising revenues from their prime time television schedule. And even with the Commission’s adoption of the 25% Independent Producer

¹⁹ *Id.* at 16.

Rule proposed by the CPD, the economics would remain the same and networks would profit from increased revenues gained through increased advertiser support, including more local advertising on their locally **owned** stations.

The networks new ability to immediately “repurpose” their programming on co-owned cable networks allow the networks to enjoy inflated revenues on a single show without spending additional funding to create the show. Because the networks own their programs, they have an enormous economic incentive to use their “repurposing” ability to immediately distribute the programs on co-owned, cross-platformed basis. In essence, networks are now, more than ever, cheating viewers of diverse programs by flooding the market with similarly formatted and similarly themed shows that co-opt the prime time market from other more diverse programs – admittedly, for the sole **purpose** to “aggressively **seek** out new ways to increase revenue and decrease **costs**.”²⁰

Despite the network’s aggressive use of various delivery venues to air redundant programming, the networks do not suffer any losses on the original network airing of the programming. As Randy Falco, President of NBC Television Network recently confirmed when speaking about NBC’s prime time schedule, “Most of those [22] hours, particularly for NBC, are very profitable.”²¹

Obviously, in a marketplace driven in large **part** by economic considerations, the networks have a right and a duty to shareholders to generate profits. But there are other important policy considerations beyond simply **maximizing** corporate **profits**. In this respect, the **FCC’s** concern should not be how much profit the networks *generate*. The fundamental FCC concern should be how

²⁰ *Id.* at 2.

²¹ Doug Halonen, *ABC Asked to Reduce Prime Time*, *Electronic Media*, Dec. 2, 2002.

much diversity is provided to the American people in the entertainment and information programming consumers receive on the ~~free~~ public airwaves that the networks use.

As David Barrett, CEO of Hearst-Argyle Television said, “The networks are overprogramming the schedule. There is too much **duplication**.”²² In fact, Study 5 acknowledges the network’s overprogramming and lack of diversity in its section titled “Blanding the Landscape.”²³

Advertisers are very concerned about the lack of diversity and program differentiation in prime time network television. The economic drivers caused by the riptide of the confluence of vertical and horizontal cross-ownership fuels the networks’ fixation on wringing every possible **high** margin cent ~~from~~ their owned programs and creates a certain sameness to the programming and the audience that will watch it. By fixating on the risk across all of **the** network owned venues, the network’s myopically embrace the broadest, most **common** programming that can “play” anywhere. **This** network induced blandness is the root cause for the shrinking audience size of prime time television. **As** noted earlier, if the audience goes down, then the cost of advertising (as expressed by cost per thousand viewers) goes up. This cost of doing business **is** inevitably passed on to the American public in the prices of the goods and services that they consume. If the networks continue on this unregulated path, the **American consumer** will pay significantly more **as** advertisers must compensate for smaller audience sizes and therefore, increased costs.

²² Dan Trigoboff, *Barrett: Less Could Be More*, Broadcasting and Cable, Dec. 2, 2002, § D2 at 2.

²³ P r o m Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on P r o m Diversity. at 45 (Sept. 2002).

Even more troublesome, the similarity of programming and program audience delivery has automatically limited advertising access to certain segments of the American population, because the television networks do not program to those diverse populations. It is almost as if the networks have gone from broadcasting to “broadest casting.” In today’s unregulated prime time television programming marketplace, network officials apparently have come to believe that it is ever more difficult to introduce (and thus, there is a lower incentive to develop) new products that could improve quality of life, due to the continued diminishment and blending of program audiences. Consequently, marketers are stifled in their ability to create products that serve diverse segments of the population, and those diverse Americans’ needs are not met because the products that benefit ~~their~~ lifestyles are neither actively made nor successfully distributed. Marketers and advertisers need diverse audiences to whom to target diverse products. When the bland programming and small, non-diverse audience size limit marketers and advertisers, everyone suffers, except, of course, the networks that cut costs by “repurposing” the same program in another co-owned venue.

Advertisers’ longstanding complaint to the networks continues to be about the network’s stubborn insistence on targeting programs to an audience that is 18-49 years old without any regard for the multitude of differences both within and outside of that limited demographic definition. This intransigence by network officials is particularly misguided since there are almost 3,500 brands advertised in prime time that should be reaching countless diverse target audiences. Further, the proper advertising environment is different for each brand. Accordingly, it is frustrating to advertisers that at any given point in time under the current unregulated network framework, there is a remarkable duplication not only in audience but also in look and feel of the programming that advertisers are asked to support.

Perhaps that **is** because, **as** OPP's Working Paper 37 points out, the networks are spending a significantly lower percentage of their revenues from advertising **on** the raw material that **is** the dominate genre of prime time programming – network “in-house” programming. According to the Working Paper, the networks **spent** 30.3% of their advertising revenue **on** programming in 1994 but only **26.3%** in 2000.²⁴

The situation is so stultifying that **a** group of advertisers actually got together and **formed** the “Family Friendly Forum” – an organization that has funded script development for programming that **was** better suited to their desired audience. The fact that major U.S. advertisers had to take it **upon** themselves and advance their own dollars to develop diverse, quality prime time television programming because the networks **would** not, confirms the dismal state of network prime time programming. Unfortunately, the record also confirms that the FCC's deregulation of the broadcast **industry** fostered the current crisis situation of diminished program diversity.

Importantly, in the case of the Family Friendly Forum's programming, the networks still insist **on** owning the rights to Family Friendly programs through all facets of that programming's distribution. Incredibly, the networks only agreed to refund the money spent by the Family Friendly **Forum** for script development if the networks “pick **up**” the show. In other words, the networks are **so** risk-averse because of their current state of **vertical** and horizontal cross-ownership, which guarantees them profits, that they still only embrace diverse Family Friendly Forum programming concepts when they can be assured of maximum profits. Clearly, **the** networks **also do not listen to** the public's desires for more diverse, quality prime time programming, for **if** they did they would

²⁴ Federal Communications Commission, Broadcast Television: Survival in a Sea of Competition, OPP Working Paper Series 37, at **132** (Sept. 2002).

commit resources to seek out much needed diverse programming without *the* advertiser challenge that successfully drew viewers to programs created by the Family Friendly Forum.

As the FCC balances the network's pleas for further deregulation with the Commission's goals of fostering more diversity, localism and competition, the Commission must embrace the concept of a prime time carve-out in which the networks would be required to air **25%** of their prime time schedule with programming ~~from~~ independent producers. Study 5 provides compelling proof for the Commission that this **25%** independent producer carve-out would enhance the current level of program diversity by freeing network programmers from the debilitating economic constraints."

As Matt Williams, producer of *Home Improvement*, said in the Study 5:

I believe the best creative work always happens when there **is** a creative tension. It used to be, studio executives would go into the network and they would fight like hell because they had ownership of **this** show, literal ownership, but also they felt proud about a show they would beat the shit out of the network to get **their** show. How do you do that when it's the same company? And so what usually happened is out of ~~that~~ tension there was always a better show evolving where you challenged each **other**.²⁶

If the programming in the carved out periods is given equal support **and** attention by the networks, it will have at least equal success rate to their current programming. But as suggested by Matt Williams, network executive Ted Harben and others in Study **5**, **this** independently produced programming is likely to have an even better success rate. Following the adoption of the **25%** Independent Producer Rule, the networks will soon realize that diverse programs are far more

²⁵ See Program Diversity and The Program Selection Process on Broadcast Network Television FCC Media Ownership Working Group, Study No. 5, A Historical Perspective on Program Diversity (Sept. 2002).

²⁶ Id. at 29.

profitable than the current bland programming that is the unavoidable by-product of the current vertical and horizontal ownership regulatory environment.

The **25%** Independent Producer Rule would also promote diversity in other areas where the public airwaves are used. **Part** of the reason for the “blanding of the landscape” is the fact that the networks now make the same programs available everywhere at once. Study 5 correctly points out that syndication in the non-network time periods over broadcast stations is now happening **simultaneously** as network’s use a multiple exposure strategy to maximize profits from the same programs.

. . . networks have begun selling shows into broadcast and cable outlets at the same time even at the risk of reducing viewership of newly-produced episodes of that **show**. Ted Harbert explains [that] “networks...can’t wait to get a **show** that they have **into** syndication to a fault. They want them out there so quickly to **try** and reap some revenue. . . . As [Steve] McPherson [President of Touchstone Television] explained it **to** me, a show goes into syndication “whenever that **distribution entity** feels that it can take advantage of the asset in the most productive **way**.”²⁷

This strategy to maximize network profits at the cost of diverse, quality network produced programming unfortunately also costs the American public, who has the same program in different time periods. as opposed to the preferable opportunity, where the viewer has access to different and diverse programming at all times of the day.

In defending their multiple exposure strategy of fewer programs available simultaneously in more markets, the networks speciously argue that it is in the public interest because they are **making** the programs available at **various** times when the public would want to see the programs. However, it is well established that the public already has this **opportunity** through the almost universal

²⁷ Id. at 34-35.

ownership of VCRs which allow consumers to repeatedly access network programming; this VCR capability is also becoming augmented for much of the public through the use of TiVo, a technology now being installed in a rapidly growing number of set-top boxes and directly in TV sets. Importantly, the 25% Independent Producer Rule would create an environment where the networks could use their prime time schedule to provide an enhanced mix of programming to the American public who, through technology, can then decide when to watch these programs.

The networks also argue, with little credibility, that they need this immediate programming double-dip because they are losing audience share to the cable networks. When making that argument, the networks obfuscate the fact that they are also among the most successful cable companies. Michael Eisner (Chairman and CEO, Disney), in a controversial Wall Street speech, confirmed that ESPN and the cable operations are vital to Disney.²⁸ Eisner's failure to mention ABC as also being important to the corporation, sent shockwaves through the ABC affiliate body; it should also have upset lower income Americans, who make up 20% of our population, but who do not have cable or satellite services. These citizens are the special demographic audience most adversely impacted by the network's inordinate fixation on the profits and the alleged economic efficiencies that the networks enjoy when airing low budget in-house network developed prime time programming.

Because there is no 25% Independent Producer Rule, the networks co-ownership of cable has created an even further decrease in diversity of programming available to the American public. As Study 5 also reports:

²⁸ Christopher Grimes, *Eisner Pledges Rebound in Disney Profits By Next Year*, Financial Times, Oct. 2, 2002, at Front page.

In addition to accelerating the traditional point for selling programming into syndication, networks are attempting to reap more immediate financial benefits on shows they own by repurposing them on cable networks An example of this is *Alias*. **This** program is produced by Touchstone, **airs** on ABC on Sunday night and repeats later in the week on ABC Family. Fox also did **this** with **24** **when** it aired its original show on a Tuesday night and **then** repeated that same episode twice **on** the FX channel within one week of its initial broadcast airing.”

The networks’ current cross ownership strategy has created a troublesome reality of less diverse prime time programming for U.S. viewers of network television. The reality of three hours per week being programmed with repeated episodes is **an** unintended consequence of the current regulation-free environment that will be exacerbated with further network deregulation. The 25% Independent Producer Rule would limit, if not prevent, the diminished diversity caused by cross ownership or the undesirable **further** relaxation of the **35%** broadcast cap.

There **are** those network officials who argue that without cross ownership, independent programming could not get produced. They argue that producers need the co-financing of the networks, **as** there is no market for independent producers *to* finance the deficits. In reality, there is very limited independent television financing at this time because few, if any, financial institutions would risk capital when there **is** no guaranteed return; and regrettably there is no guaranteed return, **primarily** because there is little left after the network takes out its ownership percentage for allowing a program to **air on** the network’s prime time schedule. With the **25%** Independent Producer Rule, the current anti-competitive network dominated situation would change, and new and **significant** sources of deficit financing would reappear for television **produced by** independent producers, **who**

²⁹ **P r o m Diversity and The Program Selection Process on Broadcast Network Television**, FCC Media Ownership Working Group, Study No. 5, **A Historical Perspective on Program Diversity**, at 36 (Sept. 2002).

would retain the ownership rights in their programming airing on the **25%** of the network's prime time schedule.

The current state of technology and commercial viewing habits of the public are also troubling to advertisers. "28.6% of the audience **stop(s)** watching television or switch away to another channel" according to the Advertising Research Foundation? **TiVo users** currently skip 88% of commercials when viewing prerecorded, time-shifted programs.' The situation is so due that **Mel Karmazin, CEO** of CBS's parent, Viacom, threatened to "[t]urn CBS into a pay network" at the CSFB analysts meeting on December 9, 2002. In addition, Disney and Fox are currently testing subscription video on demand for network programming with and without **commercials**.³² **Not** only does this network strategy further exacerbate the "always available" aspect of current programming, it could ruin the very underpinnings of the advertiser financing of broadcast television – **a medium** particularly vital to the needs of those **43,411,000 Americans** who do not or cannot **pay** for cable/satellite services.

In **an** interim step, the networks have been selling increased numbers of integration of product messages into the programs. This is made possible by the **networks'** **unregulated** common ownership of production and broadcast. Unfortunately, only the largest advertisers can afford this integration. **Smaller** advertisers and **brands** they represent are left out **in** the cold. It **is also** arguable *that* with program/advertising integration, advertisers can intrude into the programming development process – **and** ultimately the quality of the **programs** could be diminished by the potential of

³⁰ **Lex van Meurs**, *Zapp! A Study of Switching Behavior During Commercial Breaks* (Journal of Advertising Research), Jan./Feb. 1998, at Conclusion (available at <http://www.arfsite.org>).

³¹ **Michael Lewis**, *Boom Box*, N.Y. Times, August, 12, 2000, § 6 (Magazine), at 36.

³² **R. Thomas Umstead**, *Fox To Launch Action Sports Network*, Multichannel News, Dec. 9, 2002 at 6.

inordinate advertiser influence. Should this be the case, a **25%** Independent Producer Rule would limit the potential of intrusive content control since both the independent producer **and** the network would have to agree **on** every facet of the integration. Unfortunately, in the current environment where the networks absolutely control 100% of their **prime** time programming, the “creativetension” inherent in an independent/network relationship is non-existent. In short, **the** networks have total control, and these four mega-corporations who use free spectrum can do whatever they want to generate maximum profits with **no** requirement to maximize diversity on their prime time schedule.

For advertisers, it is **an** accepted tenet throughout the advertising industry that viewers are more attentive to commercials in programs that they care about.” It is hard to care about redundant programming that is very similar to everything else on the air. **This** is particularly true when a program is aired repeatedly and in rapid succession on several different co-owned network delivery **systems** – whether broadcast or cable. With the Commission’s adoption of the **25%** Independent Producer Rule, more diverse **programming** will be created that will appeal to the diverse viewer **tastes** of the American public. Importantly, this independently produced programming **would be** aired in patterns that would help recreate the “specialness” of the medium. For the **U.S.** advertising industry, that “specialness” can lead to more interest in the **commercials** aired in the programs.

When programming is **unique**, different, and appealing, audiences grow. That reality is constantly proven time and again. **A 25%** independent producer carve out rule would create a situation where there is an increased diversity of programs that attracts increased diverse **audiences**. **This, in** turn, would generate more enthusiastic advertiser support. Without the **25%** Independent Producer Rule, **the** programming differentiation and audience size and diversity will continue to

³³ See Report Proves Loyal Viewers Watch More Ads, The Meyers **Report** (Sept. 29, 2000).

seriously diminish. If **programs** continue to be monotonous, viewer support will continue to **shrink**. Due to the economic nature of television advertising, and the fact that **advertisers** pay for audience, the advertisers will pay more in cpm even if the cost per commercial **stays** constant. **This** will have the effect of pressuring the broadcasters to add ever more commercials to **keep** their revenues up, which explains why clutter has escalated so much since the FinSyn Rules were abolished. In **turn**, audiences will continue to diminish and broadcasters will be economically unable to **serve** the broadest percentage of television viewers.

It is clear. in both the advertising trade publications and in Study 5, that advertisers are clamoring for **better programming**, **as** they are vitally interested in the range **of** audience delivered to that **programming**. The long-term viability of the broadcast system is based on **this** dynamic. Advertisers have **a** diverse list of brands with diverse audiences of potential customers, and advertisers desperately need diverse genres of quality, diverse prime time television programming to **grow** the audiences that will view advertiser supported network television.

If **the** Commission fails to adopt this **25%** Independent Producer Rule, nor only **will** the advertising community be forced to increase its payments to the networks, but more importantly, the American consumer ultimately will bear the financial burden as they (the Consumers) will bear the increased costs for the price of products and services they use. If left to a television marketplace with little broadcast ownership outlet regulations, without a concurrent governor to **a** certain marketplace economic drive through the **FCC** goals, prime time programming advertising will continue to diminish, and the American consumer will pay more. That **is**, **unless** the FCC intervenes to ensure and promote the Commission's fundamental goals of **diversity**, localism and competition in the prime time marketplace,

IV. THE JUDICIAL SUSTAINABILITY OF THE 25% INDEPENDENT PRODUCER RULE

The Commission's long standing fidelity to promoting its bedrock goal of program diversity has been repeatedly upheld by Federal Courts which recognize the Commission's need for appropriate regulatory flexibility in pursuing what the FCC concludes is in the public interest. While the Commission repeatedly acted to promote its essential goal of diversity in all aspects of broadcasting — including television programming — the courts have reviewed the Commission's actions and given the Commission broad flexibility to reasonably regulate broadcast licensees in a manner that the Commission determines will promote diversity, competition and localism.

As the Commission conducts this Omnibus Broadcast Rulemaking — particularly its focus on networks' request for elimination of the 35% national broadcast cap and elimination of the Dual Network Rule, the Commission must give serious consideration and appropriate weight to the irrefutable documentation that the current prime time television programming marketplace is overwhelmingly dominated by the four networks — ABC, CBS, NBC and Fox. Based on this anti-competitive, diversity-chilling programming reality, the Commission has ample court precedent to adopt the 25% prime time television carve out rule for independent producers — producers who would, if provided the opportunity, compete vigorously to have their diverse, non-network controlled programming air for consumers who rely on free, advertiser supported network television.

In Schurz Communications, Inc. v. FCC, the Seventh Circuit Court of Appeals, while vacating the FCC's decision regarding a modified FinSyn Rule, confirmed that “the Commission could always take the position that it should carve out a portion of the production and distribution markets and protect them against the competition of the networks in order to foster, albeit at a higher

cost to advertisers and ultimately to consumers. a diversity of programming sources and outlets that might result in a greater variety of perspectives and imagined forms of life than the free market would provide. That would be a judgment within the Commission's power to make.'"

Clearly the Schurz Court acknowledged the wide discretionary authority fundamental to the FCC's conduct when regulating broadcast licensees in a manner that the Commission believes will promote diversity. While the Schurz Court ruled against the Commission for failure to properly consider the entire record in that case, the Seventh Circuit, nonetheless, reaffirmed and emphasized the Commission's duty to promote diverse programming.³⁵

Regarding diversity, the Schurz Court concluded that "the Commission's concern, acknowledged to be legitimate, is not just with market power in an antitrust sense but with diversity, and diversity is promoted by measures to assure a critical mass of outside producers and independent stations."³⁶ Thus, even though the court vacated the FCC's remaining FinSyn rules in 1992, the court confirmed that the Commission can legitimately adopt measures to promote diversity when it reasons from the record that its diversity goal will be advanced.

The Schurz Court further concluded that "even if the networks had zero market power, the Commission might in the discharge of its undefined, uncanalized responsibility to promote the public interest restrict the network's programming activities in order to create a more diverse programming fare.'" Thus, the Schurz Court, far from restricting the regulatory activities of the FCC when the Commission seeks to advance its goal of promoting program diversity, explicitly

³⁴ Schurz, *supra*, 982 F.2d at 1049.

³⁵ See *id.*

³⁶ *Id.* at 1050.

³⁷ *Id.* at 1054.

endorses that **function**.³⁸ Importantly, unlike the case of the modified FinSyn rules of 1992, the Commission, as part of its Omnibus Broadcast Rulemaking, now has before it in this proceeding, a solid and unambiguous record that confirms that the four networks now dominate the prime time television programming schedule that is so vital to millions of U.S. consumers — **including** those **43** million consumers who have no access to pay services.

Importantly, Study 5 concluded that “[y]es, there has been consolidation in the production side of the [prime time television] business. *Yes*, the networks — whether we *are* talking about three, four or **six** — now account for **an** overwhelming majority of the programming that appears in prime time.”

While acknowledging the **serious** diminishment of the prime time television **programming** sources which resulted 60m network consolidation, Study 5 glibly makes the unsupported - and unsupportable-conclusion that the networks’ overwhelming control and ownership of **programming** for their prime time schedules has little impact on the diversity of prime time television **programming**.⁴⁰ On this fundamental point, it is simply counter-intuitive to conclude, as Study 5 does, that the prime time television viewing public would not have access to more diverse prime time programming if 20, 40 or 100 independent producers were added to the **mix** of programming sources now dictated for the viewing public by four — **and** only four — **network** executives responsible for 100% of the networks prime time schedule. Study 5’s credibility is further called into question when it concludes that “this paper finds such [consolidation of **prime** time television

³⁸ See *id.*

³⁹ Program Diversity and The Program Selection Process on Broadcast Network Television, FCC Media Ownership Working Group, Study No. 5, **A** Historical Perspective on Program Diversity, Appendix at 36 (Sept. 2002).

⁴⁰ See *id.*

programming sources into only four networks] has not had a meaningful effect on the diversity of content.'⁴¹

Despite this sweeping conclusion, Study 5 states that "the extent to which purely economic considerations affect program diversity on broadcast television cannot be determined with any precision."⁴² Simply stated, Study 5's author admits that it is impossible to **fully** measure the impact of network consolidation and the resulting diminution of diverse programming on the **networks'** prime time schedule. Based on this compelling admission, the Commission must look to objective factors and conclude, **as** the CPD argues, that it is reasonable to expect that there will be more diverse prime time television programming if the Commission adopts a **25%** Independent Producer Rule that allows independent producers to compete to ~~air~~ their programming **on 25%** on the current **prime** time television schedule — a schedule that is **overwhelmingly** dominated by network owned **and** produced programming.

Unlike the Schurz Court's criticism of the FCC, more than **a** decade ago, for its failure to appropriately consider the record before it, the record before the FCC today is clear, compelling and **unequivocal** on the key point: the networks dominate prime time television programming with their in-house produced programming. Based on this reality, even acknowledged in **Study 5**, the Commission has a record upon which to reasonably conclude that the current network produced programming available to U.S. consumers is likely to become more diverse if independent producers **are** able to become additional **non-network** sources of prime time television programming because of **the FCC's** adoption of the 25% Independent Producer Rule.

⁴¹ Id.

⁴² Id. Appendix at 37.

In considering CPD's request for the 25% Independent Producer Rule, the Commission need only look for guidance to its own words in its September 12th NPRM; there, the Commission noted that the D.C. Circuit in Fox Television held that "in the context of broadcasting, the public interest has historically embraced both diversity and localism, that protecting diversity is a permissible policy for the agency to seek to advance"⁴³

Similarly, in Rust v. Sullivan, the U.S. Supreme Court ruled that federal regulators, implicitly including the Commission, were entitled to use broad flexibility in discharging their regulatory functions.⁴⁴ When considering radical changes confronting regulators, the Rust Court held that "[a]n agency is not required to 'establish rules of conduct to last forever,'⁴⁵ but rather must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" While the factual basis for the Rust decision is unrelated to the current situation of extreme consolidation in the network dominated prime time television marketplace,⁴⁷ the Commission currently is confronting radically changing circumstances in the consolidated broadcast marketplace that it regulates. These radical changes have been triggered in large part by the extreme and rapid consolidation in the U.S. broadcast programming marketplace following the elimination of the FinSyn Rule and the subsequent broadcast deregulation mandated by the 1996 Telecom Act. Accordingly, the Supreme Court's endorsement in Rust of the basic concept of regulatory flexibility to adjust to changing

⁴³ 2002 Biennial Regulatory Review at ¶ 14 (citing Fox Television, Inc. v. FCC, 280 F.3d 1027, 1042 (D.C. Cir. 2002)).

⁴⁴ See Rust v. Sullivan, 500 U.S. 173 (1991).

⁴⁵ Rust, 500 U.S. at 186-187 (quoting Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 42 (1983) (quoting American Trucking Assns., Inc. v. Atchison, T & S.F.R. Co., 387 U.S. 397, 416 (1967))).

⁴⁶ Id. at 187 (quoting Motor Vehicle Mfr. Assn., supra, 436 U.S. at 42) (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968)).

⁴⁷ See generally Rust, 500 U.S. 173 (1991).

circumstances is relevant to the Commission's deliberations when considering the need for a 25% Independent Producer Rule — a rule that is justified in view of the extreme degree of consolidation and network dominance that now exists in the narrow prime time television programming marketplace. Importantly, the Rust Court, like the Fox Court, affirms the regulator's right to act in a manner that the regulator believes will advance the public interest.⁴⁸ For this reason, since program diversity is — as this Commission has repeatedly affirmed — in the public interest, the Commission must take appropriate content neutral regulatory action to promote program diversity.

Anything less than adoption of this 25% Independent Producer Rule will be a transparent abandonment of the Commission's commitment to its goals of diversity and competition in the prime time television programming marketplace. Importantly, from a consumer perspective, the Commission's adoption of the judicially sustainable 25% Independent Producers Rule will restore diversity and competition to the network dominated prime time television marketplace — a marketplace where for decades, independent producers such as Norman Lear, Marian Rees, Marcy Carsey, Steve Cannell and Mary Tyler Moore produced non-network owned, diverse television programming that enriched the lives of countless television viewers in the United States.

⁴⁸ See id.

V. THE PUBLIC INTEREST AND THE 25% INDEPENDENT PRODUCER RULE

The Commission, in adopting its NPRM in this proceeding, reiterated its longstanding **commitment** to broadcast ownership policies that “traditionally have focused **on** advancing three broadly defined goals: (1) diversity, (2) competition, and (3) **localism**.”⁴⁹ These goals have repeatedly been embraced by the Commission as integral to the public interest — **and** they have consistently been upheld as valid goals by courts that reviewed various Commission broadcast ownership rules.

In *two* recent Powell Commission actions designed to promote the public interest, the Commission has articulated public interest policies that by analogy, complement and support CPD’s request that the Commission adopt the **25%** Independent Producer Rule?’

In a recent statement issued following the Commission’s **unanimous** rejection of the Echostar-Hughes Electronics merger, Chairman Powell explained that the Commission’s rejection of the proposed merger was “particularly **compelling**,”⁵¹ because consumers in **rural** America not served by cable would be left **with** only one choice for their subscription video service. Based **on** the Chairman’s and his fellow Commissioners’ concerns about limited programming sources in the EchoStar case, the Commission should be equally concerned about the limited sources of **programming in** today’s prime **time** network television marketplace. In **this arena**, consumers only

⁴⁹ 2002 Biennial Regulatory Review at ¶ 5.

⁵⁰ See Chairman Michael K. Powell, Statement re: Application of EchoStar Communications Corporation (Echostar); General Motors Corporation and Hughes Electronics Corporation (**DirectTV**) (Oct. 18, 2002); see also Federal Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at 11 (released Nov. 2002).

⁵¹ Chairman Michael K. Powell, Statement re: Application of EchoStar Communications Corporation (EchoStar); General Motors Corporation **and** Hughes Electronics Corporation (**DirectTV**) (Oct. 18, 2002).

have access to prime time television programming overwhelmingly developed and owned by the four networks.

Just as the Commission rejected the proposed EchoStar-Hughes merger because it would diminish viewers' choice, the Commission must now act to remedy the stark anti-competitive reality of the current network-dominated prime time television programming marketplace. In view of today's grossly consolidated media marketplace that has resulted in diminished diversity of prime time television programming sources, the Commission must take appropriate regulatory action to promote program diversity in a content neutral manner. As demonstrated by the record before it, the Commission cannot rely alone on the narrow prime time television marketplace to promote competition and diversity of programming sources. CPD's filing in this proceeding confirms that this narrow marketplace, when left unregulated, deprives consumers of diverse sources of prime time television programming.

Separately, in the Commission's recently released Report by its Spectrum Policy Task Force (the "Task Force"), the FCC once again reiterated the need to take appropriate regulatory action when the marketplace alone is inadequate to achieve a particular public interest goal. Established by the Commission to develop policy options for the most enlightened use of the spectrum, the Task Force focused on the special public policy considerations guiding the Commission's regulation of spectrum used by broadcasters: "localism and diversity of ownership are two important public interest objectives that have been associated with broadcasting to a greater degree than other spectrum users"⁵³ and "the Commission's policies surrounding spectrum allocated for broadcasting

⁵² Federal Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at 11 (released Nov. 2002).

⁵³ *Id.* at 45.

service, especially in the context of the conversion from analog to digital **television**, have taken into account localism and access to free-over-the air **television**.”⁵⁴ Importantly, the **Task Force** also “recognized that there may be situations where the **Commission finds** it necessary to promote spectrum or technical efficiency (**as** opposed to economic efficiency) in order to promote particular public interest goals [W]here marketplace forces may be inadequate” to achieve particular public interest goals, the Commission’s spectrum policy experts urged the Commission to find alternative regulatory means to advance public interest goals that could be more important **than** “economic **efficiencies**.”⁵⁵

Since the four networks have long argued that important economic efficiencies have resulted from vertical integration and consolidation in the broadcast marketplace, CPD’s proposed **25%** Independent Producer Rule predictably will prompt vigorous opposition from the four networks. In opposing **any** carve out **rule** for independently produced **programming**, network advocates **can** be expected to **argue** that economic efficiencies are vital to the continued viability of free advertiser-supported network television. Moreover, network officials **will** claim pending economic doom if **25%** of **their** prime time schedule is produced and owned by independent producers.

When evaluating the networks’ predictable claims of financial ruin resulting from the **Commission’s** adoption of the **25%** Independent Producer **Rule**, the Commission must **dismiss** this bogus prognosis; in reality, even with the Commission’s adoption of a **25%** Independent Producer Rule, **the networks** will still garner 100% — all — of the **advertising revenues from their prime time** television schedule. **Thus**, the networks will not be financially diminished by the **Commission’s**

⁵⁴ **Id.** at 11.

⁵⁵ **Id.**

adoption of **a** rule that ensures increased consumer access to diverse prime time television programming. To the contrary, enhanced network prime time advertising revenues will occur following **the** FCC's adoption of the **25%** Independent Producers Rule.

While FCC officials who authored **the** Task Force Report appropriately focused only **on the** most efficient use of spectrum, they correctly articulated the need for general regulatory balance when considering "economic efficiencies."⁵⁶ Adherence to regulatory balance is particularly critical in **this** proceeding where it **is** abundantly clear that the current prime time marketplace has proven to be "inadequate" to promote the Commission's fundamental goal of diversity in **the** dysfunctional prime time programming marketplace.

When confronted with the reality that **the** prime time programming marketplace is simply "inadequate" to promote diversity and competition, it is incumbent on the Commission to set up the least intrusive conditions so that **the** FCC's fundamental goal of program diversity will be realized.

Adoption of the **25%** Independent Producer Rule is a judicially sustainable content neutral means for **the** Commission to remedy the inadequacies in today's prime time television programming marketplace. Importantly, such action would be consistent with the Commission's **unanimous** vote in rejecting the Echostar-Hughes Electronics merger and consistent with the Task Force's recommendation for regulatory balance when **a** marketplace is inadequate to advance the public interest."

⁵⁶ **Federal** Communications Commission, Spectrum Policy Task Force Report, Docket No. 02-135, at **21** (released **Nov. 2002**).

⁵⁷ See id.

VI. CONCLUSION

As the Commission considers the four networks' pleas for **further** deregulatory **relief** from the 35% **cap** and the Dual Network Rule — **relief** that will **seriously** exacerbate the already excessive consolidation in the U.S. broadcast marketplace — the Commission has an important **and** timely **opportunity** to promote its fundamental goals of diversity and competition in the **narrow**, network dominated prime time television programming marketplace. **As** documented by CPD in these comments, source diversity has **significantly** diminished in the past decade, leaving the public with substantially fewer options for access to diverse **programming** on prime time network television.

By adopting a content-neutral **25%** prime time television rule for independently produced programming, the Commission will promote its bedrock goal of program diversity by **affording** a once vital **independent** production community the opportunity to again compete vigorously to bring diverse creative television programming to U.S. viewers of advertiser-supported **free** network prime time television.

With its adoption of the **25%** Independent Producers Rule, the Commission also will simultaneously afford the advertising community — so vital to the continued viability of **free** television — the opportunity to support additional genres of diverse independently produced **prime time** television **programming**. Importantly, the **25%** **regulatory** carve out for independent produced **programming** would not deprive the four networks of advertising revenues; even with the **25%** Independent Producers Rule in place, the networks would still have exclusive access to **all** advertising revenues generated by their entire prime time schedule. Moreover, because the **25%** Independent Producer Rule would result in more diverse **prime time** programming, **this** rule could **be** expected to increase the networks' advertising revenues by introducing vigorous **independent**

producer-generated competition in the network dominated, prime time television programming marketplace.

In terms of judicial sustainability, the Schurz Court, the Fox Court and the Rust Court all have confirmed the appropriateness of regulatory action to promote a legitimate **Commission** goal. In this case, the Commission's fundamental goals of promoting diversity and competition in the network dominated prime time television marketplace will be advanced by the adoption of the **25% Independent Producer Rule**.

For U.S. consumers, particularly those **43** million prime time television viewers **who** are **primarily** dependent on advertiser-supported free television, the Commission's adoption of a **25% prime** time television rule for independently produced programming would mean dramatically different and diverse programming choices. And these choices would not be dictated by the commission since the **25% Independent Producer Rule would** be content neutral.

The opportunity to significantly advance the Commission's dual goals of diversity and competition in the narrow network dominated prime time television marketplace is enormous, yet fleeting, as the Commission conducts its comprehensive review of its broadcast regulations.


The Commission's **landmark** review of its broadcast **regulations** also provides an important **opportunity** to generate added value for the public from the four networks' **auction-free** use of their analog and digital **spectrum**. For the millions of viewers of advertiser-supported network television, the FCC's adoption of the content neutral **25% Independent Producer Rule will** mean that **network programming** — aired on **spectrum** that is a valuable public resource — will be more diverse because at least **25% of** prime time television programming **will** be generated by independent non-network **sources**.

Since increased media consolidation — and diminished sources of prime time television programming — are inevitable by-products of further **FCC** deregulatory action, the Commission must adopt the content neutral 25% Independent Producer Rule proposed by the CPD. By taking this judicially sustainable action, the Commission will insure that future generations of U.S. viewers of advertiser supported prime time television will have access, at least in **25%** of cases, to a wide array of programming options developed by dozens of independent producers who compete fiercely to air their creative and diverse programming before U.S. consumers. Absent its adoption of the 25% Independent Producer Rule, the Commission will limit consumers of prime time network television to the restricted genres of programming ultimately chosen by four network officials.

Respectfully submitted,
COALITION FOR PROGRAM DIVERSITY



Kenneth Ziffren
Ziffren, Bnttenham, Branca, Fischer, Gilbert-Lurie & Stiffelman LLP.



Michael R. Gardner
The Law Offices of Michael R. Gardner, P.C.

January 2, 2003

Appendix A

American Federation of Television and Radio Artists

American Federation of Television and Radio Artists (AFTRA) is a national labor organization representing over 80,000 professional employees working in the entertainment, news, advertising and sound recordings industries. AFTRA's membership includes actors, singers, and other performers appearing in all types of television programming, including dramatic programs, serials, game shows, and talk and variety shows; broadcasters on television and radio; sound recording artists; and performers in non-broadcast/industrial works and new technologies such as interactive programming and CD-ROMS.

Appendix B

The Directors Guild of America

The Directors Guild of America (DGA) represents 12,700 directors and members of the directorial team who work in feature film, filmed/taped/and live television, commercials, documentaries, and news. Members include Directors, Unit Production Managers, Assistant Directors, Associate Directors, Technical Coordinators, Stage Managers, and Production Associates. DGA serves as the exclusive collective bargaining representative for these individuals.

Appendix C

The Screen Actors Guild

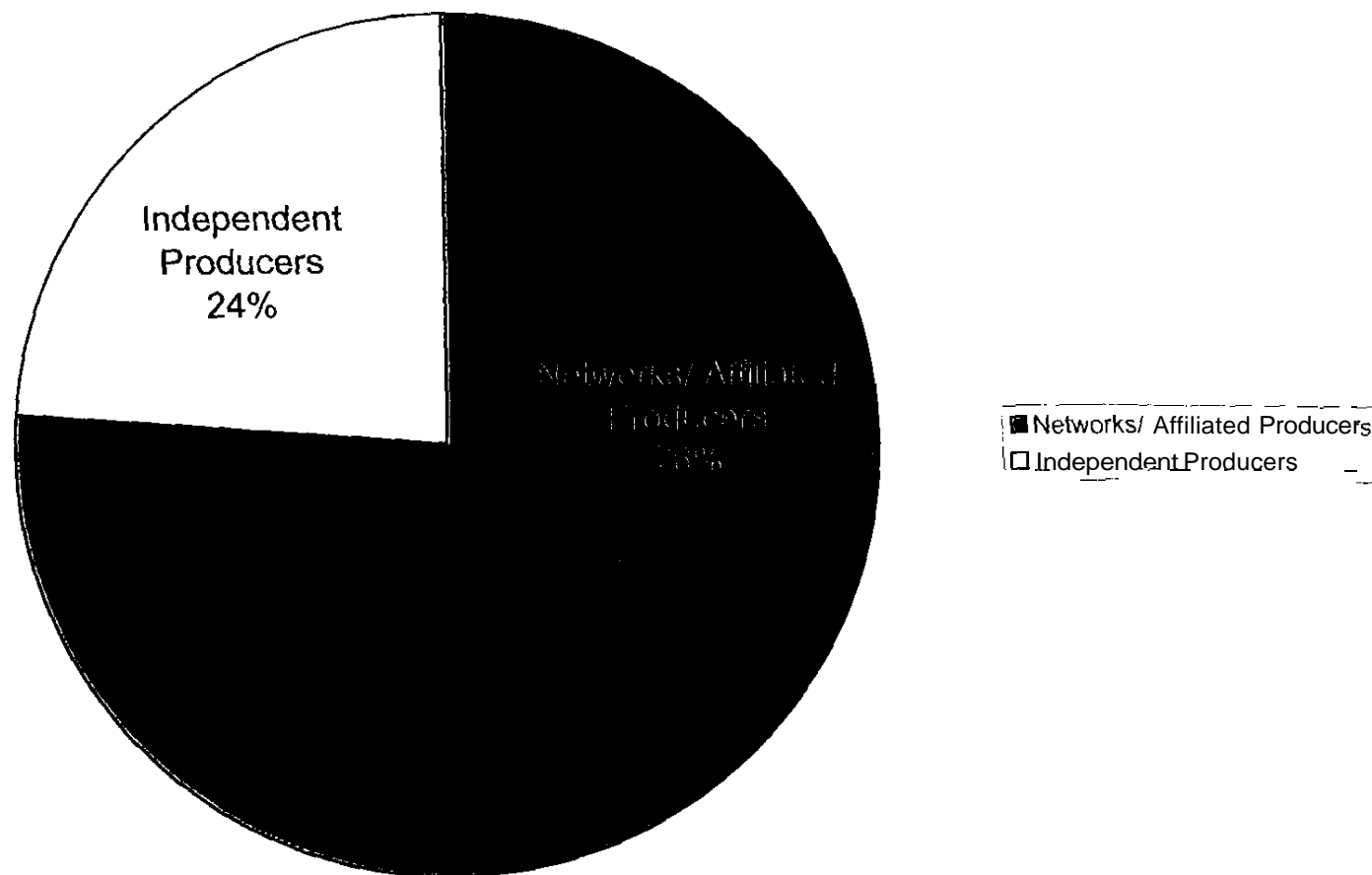
The Screen Actors Guild (SAG) has 120,000 members who work throughout the world under SAG contracts. **SAG** was founded in 1933 and represents actors in films, television, commercials and on the Internet. Melissa Gilbert is National President of the Screen Actors Guild.

Appendix D

Coalition for Program Diversity Study (CPD Study), 2002-2003 *TV Season **Primetime** Network Program Ownership (ABC, CBS, Fox, NBC)*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

2002-2003 TV Season
Primetime Network Program Ownership (ABC,CBS,Fox, NBC)

71 Primetime Hours Per Week
(Excludes theatricals and MOWs)



Appendix E

CPD Study, *2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW*, 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 2002-2003: Guide to the 2002-2003 Television Season (Oct. 2002)).

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
8 SIMPLE RULES	ABC	Touchstone	0.5	1	0.5		
LIFE WITH BONNIE	ABC	Touchstone	0.5	1	0.5		
LESS THAN PERFECT	ABC	Touchstone	0.5	1	0.5		
MEDS	ABC	Touchstone	1.0	1	1.0		
DINOTOPIA	ABC	Hallmark	1.0			1	1.0
PUSH, NEVADA	ABC	Touchstone	1.0	1	1.0		
THAT WAS THEN	ABC	Touchstone	1.0	1	1.0		
Drew Carey	ABC	Warner Bros.	0.5			1	0.5
Whose Line Is It Anyway?	ABC	Riverside Productions	0.5			1	0.5
Monday Night Football	ABC	ABC Sports	2.0	1	2.0		
According to Jim	ABC	Touchstone	0.5	1	0.5		
NYPD Blue	ABC	Bochco Productions	1.0			1	1.0
My Wife & Kids	ABC	Touchstone	0.5	1	0.5		
George Lopez	ABC	Warner Bros.	0.5			1	0.5
The Bachelor	ABC	Telepictures	1.0			1	1.0
Prime Time Thursday	ABC	ABC News	1.0	1	1.0		
Amer's Funniest Videos	ABC	ABC/Vin DiBona	1.0	1	1.0		
20/20	ABC	ABC News	1.0	1	1.0		
Wonderful World of Disney	ABC	Disney/ABC	2.0	1	2.0		
Alias	ABC	Touchstone	1.0	1	1.0		
The Practice	ABC	20th C Fox/Kelley	1.0	1	1.0		
Total	ABC		19.0		14.5		4.5
Percentage	ABC				76.3%		23.7%
STILL STANDING	CBS	Fox	0.5	1	0.5		
CSI: MIAMI	CBS	CBS/Alliance Atlantis	1.0	1	1.0		
PRESIDIO MED	CBS	Warner Bros.	1.0			1	1.0
WITHOUT A TRACE	CBS	CBS/Warner Bros.	1.0	1	1.0		
HACK	CBS	Big Ticket Television	1.0	1	1.0		
RHD/LA	CBS	Uni/Forward Pass, Inc.	1.0			1	1.0
BRAM AND ALICE	CBS	Paramount	0.5	1	0.5		

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
King of Queens	CBS	CBS/ColumbiaTriStar	0.5	1	0.5		
Yes, Dear	CBS	Fox	0.5	1	0.5		
Everybody Loves Raymond	CBS	CBS/Worldwide Pants	0.5	1	0.5		
JAG	CBS	Paramount/Belisarius	1.0	1	1.0		
The Guardian	CBS	CBS/ColumbiaTriStar	1.0	1	1.0		
Judging Amy	CBS	CBS/Fox	1.0	1	1.0		
60 Minutes II	CBS	CBS News	1.0	1	1.0		
Amazing Race	CBS	CBS/Touchstone	1.0	1	1.0		
Survivor	CBS	CBS Productions	1.0	1	1.0		
CSI	CBS	CBS/Alliance Atlantis	1.0	1	1.0		
48 Hours Investigates	CBS	CBS News	1.0	1	1.0		
Touched By An Angel	CBS	CBS Productions	1.0	1	1.0		
The District	CBS	CBS/Universal	1.0	1	1.0		
The Agency	CBS	CBS/Universal	1.0	1	1.0		
60 Minutes	CBS	CBS News	1.0	1	1.0		
Becker	CBS	Paramount/Industry	0.5	1	0.5		
Total	CBS		20.0		18.0		2.0
Percentage	CBS				90.0%		10.0%
OLIVER BEENE	Fox	Fox/Dreamworks	0.5	1	0.5		
THE GRUBBS	Fox	Fox/Granada/Uni	0.5	1	0.5		
GIRL'S CLUB	Fox	Kelley	1.0	1	1.0		
CEDRIC THE ENTERTAINER	Fox	Fox	0.5	1	0.5		
FASTLANE	Fox	Wamer Bros.	1.0			1	1.0
FIREFLY	Fox	Fox/Mutant Enemy	1.0	1	1.0		
JOHN DOE	Fox	Regency Television	1.0	1	1.0		
Futurama	Fox	Fox	0.5	1	0.5		
The Simpsons	Fox	Fox/Gracie	0.5	1	0.5		
King of the Hill	Fox	Fox	0.5	1	0.5		
Malcolm In The Middle	Fox	Fox/Regency	0.5	1	0.5		
Boston Public	Fox	Kelley	1.0	1	1.0		
That '70s Show	Fox	Carsey-Werner	0.5			1	0.5

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Grounded For Life	Fox	Carsey-Werner	0.5			1	0.5
24	Fox	Fox/Imagine	1.0	1	1.0		
Bernie Mac Show	Fox	Regency/Fox	0.5	1	0.5		
Cops	Fox	Fox TV Stations	0.5	1	0.5		
Cops II	Fox	Fox TV Stations	0.5	1	0.5		
America's Most Wanted	Fox	STF Productions	1.0	1	1.0		
Total	Fox		13.0		11.01		2.01
Percentage	Fox				84.6%		15.4%
IN-LAWS	NBC	NBC/Paramount	0.5	1	0.5		
HIDDEN HILLS	NBC	NBC	0.5	1	0.5		
GOOD MORNING MIAMI	NBC	Warner Bros.	0.5			1	0.5
AMERICAN DREAMS	NBC	NBC/Universal	1.0	1	1.0		
BOOMTOWN	NBC	NBC	1.0	1	1.0		
Fear Factor	NBC	Endemol	1.0			1	1.0
Third Watch	NBC	Warner Bros.	1.0			1	1.0
Crossing Jordan	NBC	NBC Studios	1.0	1	1.0		
Just Shoot Me	NBC	Brillstein-Grey et al	0.5			1	0.5
Frasier	NBC	Paramount	0.5	1	0.5		
Dateline NBC-Tuesday	NBC	NBC News	1.0	1	1.0		
Ed	NBC	NBC/Viacom	1.0	1	1.0		
West Wing	NBC	Warner Bros.	1.0			1	1.0
Law & Order	NBC	Universal	1.0			1	1.0
Friends	NBC	Warner Bros.	0.5			1	0.5
Scrubs	NBC	Touchstone	0.5	1	0.5		
Will & Grace	NBC	NBC Studios	0.5	1	0.5		
ER	NBC	Warner Bros.	1.0			1	1.0
Providence	NBC	NBC Studios	1.0	1	1.0		
Dateline NBC-Friday	NBC	NBC News	1.0	1	1.0		
Law & Order:SVU	NBC	Universal	1.0			1	1.0
Dateline NBC-Sunday	NBC	NBC News	1.0	1	1.0		
Law & Order: Criminal Intent	NBC	Universal	1.0			1	1.0

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Total	NBC		19.0		10.51		8.5
Percentage	NBC				55.3%		144.7%
HALF & HALF	UPN	CBS Productions	0.5	1	0.5		
HAUNTED	UPN	CBS/Viacom/Industry	1.0	1	1.0		
TWILIGHT ZONE	UPN	Trilogy/New Line	1.0			1	1.0
The Parkers	UPN	Big Ticket Television	0.5	1	0.5		
One on One	UPN	Paramount	0.5	1	0.5		
Girlfriends	UPN	Paramount	0.5	1	0.5		
Buffy The Vampire Slayer	UPN	Fox	1.0	1	1.0		
Enterprise	UPN	Paramount	1.0	1	1.0		
WWE Smackdown	UPN	WWE	2.0			1	2.0
Total	UPN		8.0		5.0		3.0
Percentage	UPN				62.5%		37.5%
EVERWOOD	WB	Warner Bros.	1.0			1	1.0
BIRDS OF PREY	WB	Warner/Tollin/Robbins	1.0			1	1.0
FAMILY AFFAIR	WB	Turner/Pariah	0.5	1	0.5		
DO OVER	WB	Warner/Paramount	0.5	1	0.5		
WHAT I LIKE ABOUT YOU	WB	Warner/Tollin/Robbins	0.5			1	0.5
GREETINGS FROM TUSCON	WB	Big Ticket Television	0.5	1	0.5		
7th Heaven	WB	Spelling	1.0	1	1.0		
Gilmore Girls	WB	Warner Bros.	1.0			1	1.0
Smallville	WB	Warner/Tollin/Robbins	1.0			1	1.0
Dawson's Creek	WB	Columbia/Tri-Star	1.0			1	1.0
Jamie Kennedy Experiment	WB	Warner Bros./Big Tkt	0.5	1	0.5		
Off Centre	WB	Warner/Dreamworks	0.5			1	0.5
Sabrina	WB	Viacom Productions	0.5	1	0.5		
Reba	WB	Fox	0.5	1	0.5		
Gilmore Girls: Beginnings	WB	Warner Bros.	1.0			1	1.0
Charmed	WB	Spelling Television	1.0	1	1.0		

2002-2003 Network Primetime TV Ownership Excluding Theatrical/MOW

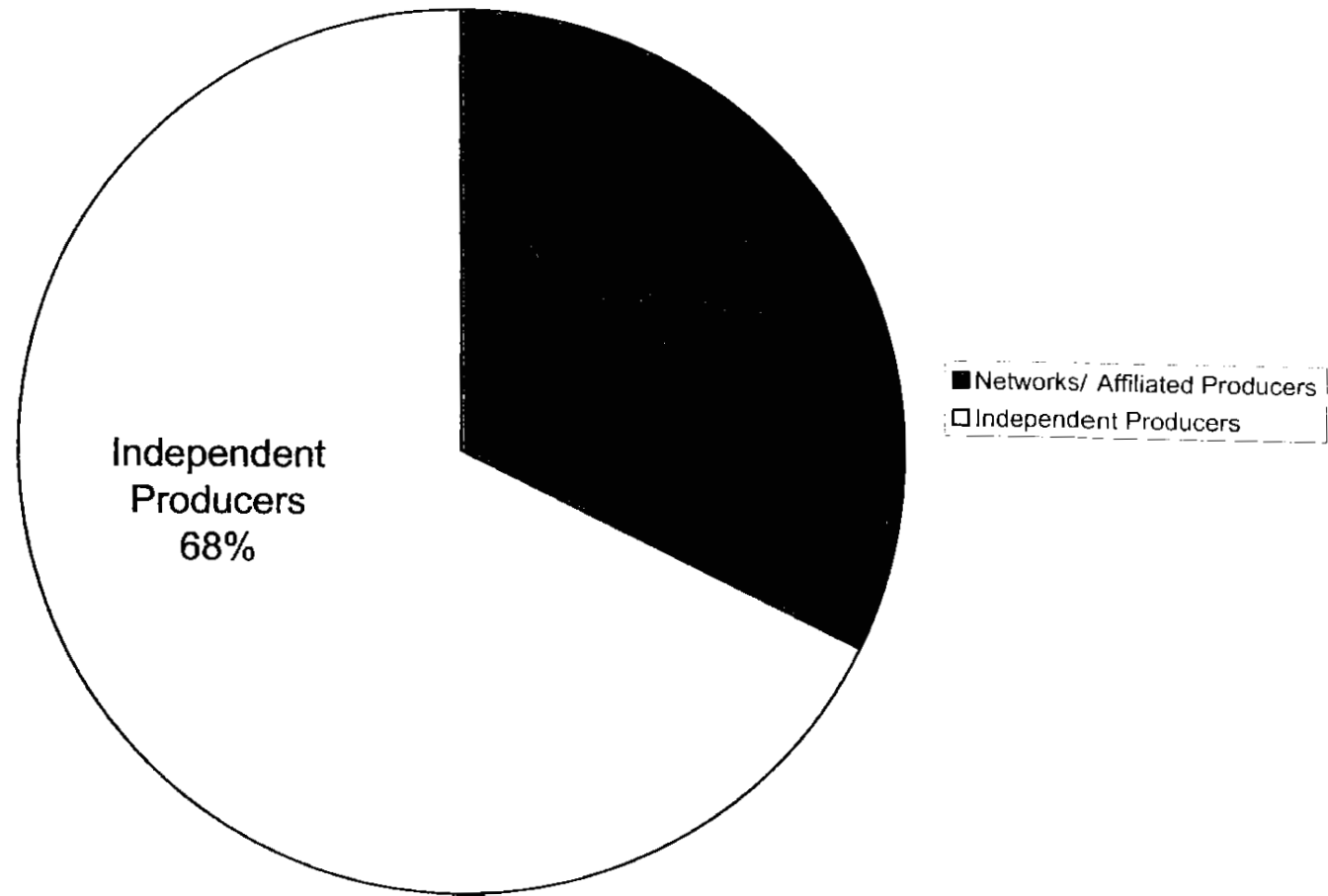
TITLE	NET	PRODUCER	Length	Networks		Produced By	
				Or		An Independent	
				Affiliated Producers		Producer	
			Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Angel	WB	Fox/Greenwalt	1.0	1	1.0		
Total	WB		13.0		6.0		7.0
Percentage	WB				46.2%		53.8%
TOTAL FOR 4 NETS			71.0		54.0		17.0
PERCENTAGE FOR 4 NETS					76.1%		23.9%
TOTAL FOR 6 NETS			92.0		65.0		27.0
PERCENTAGE FOR 6 NETS					70.7%		29.3%
TOTAL FOR UPN & WB NETS			21.0		11.0		10.0
PERCENTAGE FOR UPN & WB NETS					52.4%		47.6%
DEFINITIONS:							
Networks or Affiliated Producer : Network ownership or ownership by production entity affiliated with one of the four broadcast							
Independent Producers: Ownership by any studio not affiliated with a broadcast network (MGM/UA, Universal, DreamWorks,)							

Appendix F

CPD Study, *1992-1993 TV Season Primetime Network Program Ownership* (ABC, CBS, Fox, NBC), 12/10/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992)).

1992-1993 TV Season
Primetime Network Program Ownership (ABC,CBS,Fox, NBC)

70 Primetime Hours Per Week
(Excludes theatricals and MOWs)



Appendix G

CPD Study, *1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW*, 12110/02 (information compiled from THE HOLLYWOOD REPORTER, Primetime Network Schedule 1992-1993: Guide to the 1992-1993 Television Season (Sept. 1992)).

1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	Production Co	Copyright Holder	Length	Networks		Produced By	
					Or		An Independent	
					Affiliated Producers		Producer	
				Hrs/Wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
HANGIN' WITH MR. COOPER	ABC	Lorimar	Lorimar TV	0.5			1	0.5
GOING TO EXTREMES	ABC	Lorimar/Brand & Falsey	Lorimar TV	1.0			1	1.0
LAURIE HILL	ABC	Black & Marlens	Touchstone	0.5			1	0.5
DELTA	ABC	Universal		0.5			1	0.5
CAMP WILDER	ABC	ABC Productions		0.5	1	0.5		
COVINGTON CROSS	ABC	Reeves Ent.		1.0			1	1.0
CROSSROADS	ABC	Finnegan-Pinchuk	Lorimar TV	1.0			1	1.0
Young Indiana Jones	ABC	Lucasfilm		1.0			1	1.0
Monday Night Football	ABC	ABC Sports		2.0	1	2.0		
Full House	ABC	Lorimar/ Miller et al		0.5			1	0.5
Roseanne	ABC	Carsey-Werner		0.5			1	0.5
Coach	ABC	Universal		0.5			1	0.5
Wonder Years	ABC	Black & Marlens	Four Star Holdings	0.5			1	0.5
Doogie Howser, MD	ABC	Bohco		0.5			1	0.5
Home Improvement	ABC	Disney	Touchstone	0.5			1	0.5
Civil Wars	ABC	Bohco		1.0			1	1.0
Room for Two	ABC	Warner Bros		0.5			1	0.5
Homefront	ABC	Lorimar	Lorimar TV	1.0			1	1.0
Primetime Live	ABC	ABC News	ABC	1.0	1	1.0		
Family Matters	ABC	Lorimar/Miller et al		0.5			1	0.5
Step By Step	ABC	Lorimar/Miller et al	Lorimar TV	0.5			1	0.5
Dinosaurs	ABC	Henson	Walt Disney TV	0.5			1	0.5
20/20	ABC	ABC News		1.0	1	1.0		
The Commish	ABC	ABC/Cannell		1.0	1	1.0		
Life Goes On	ABC	Toots Prods/Warner Bro	Warner Bros	1.0			1	1.0
America's Funniest Videos	ABC	ABC/DiBona		0.5	1	0.5		
America's Funniest People	ABC	ABC/DiBona		0.5	1	0.5		
Total	ABC			20.0	7.0	6.5	20.0	13.5
Percentage	ABC					32.5%		67.5%
HEARTS AFIRE	CBS	Mozark		0.5			1	0.5
LOVE AND WAR	CBS	Shukovsky/English		0.5			1	0.5
THE HAT SQUAD	CBS	Cannell	Stephen Cannel	1.0			1	1.0
BOB	CBS	Paramount		0.5			1	0.5
PICKET FENCES	CBS	Fox	20th C Fox	1.0	1	1.0		
FRANNIE'S TURN	CBS	Carsey-Werner		0.5			1	0.5
RAVEN	CBS	Columbia	Columbia Pictures TV	1.0			1	1.0
ANGEL STREET	CBS	Warner		1.0			1	1.0
Evening Shade	CBS	CBS/MTM		0.5	1	0.5		
Murphy Brown	CBS	Shukovsky/English	Time Warner Entert	0.5			1	0.5
Northern Exposure	CBS	Finnegan-Pinchuk	Universal City Studios	1.0			1	1.0
Rescue 911	CBS	CBS/Shapiro	CBS	1.0	1	1.0		
In the Heat of the Night	CBS	Silverman/MGM	MGM/UUA	1.0			1	1.0
48 Hours	CBS	CBS News		1.0	1	1.0		
Top Cops	CBS	CBS Canada/Grosso-Jacobson		1.0	1	1.0		
Street Stories	CBS	CBS News	CBS	1.0	1	1.0		
Knots Landing	CBS	Lorimar	Lorimar	1.0			1	1.0
Golden Palace	CBS	Witt-Thomas-Harris	Touchstone	0.5			1	0.5
Major Dad	CBS	Universal	Universal City Studios	0.5			1	0.5
Designing Women	CBS	Mozark	Columbia Pictures TV	0.5			1	0.5
Brooklyn Bridge	CBS	UBU	Paramount Pictures	0.5			1	0.5

1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	Production Co	Copyright Holder	Length	Networks		Produced By	
					Affiliated Producers		An Independent Producer	
					# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
60 Minutes	CBS	CBS News						
Murder, She Wrote	CBS	Universal	Universal City Studios	1.0	1	1.0	1	1.0
Total	CBS			18.0	7.0	6.5	16.0	11.5
Percentage	CBS					36.1%		63.9%
THE HEIGHTS	Fox	Spelling	Spelling	1.0			1	1.0
MELROSE PLACE	Fox	Spelling	Spelling	1.0			1	1.0
MARTIN	Fox	HBO Independent	Subsid TW Entertainment	0.5			1	0.5
LIKELY SUSPECTS	Fox	Four Point		0.5			1	0.5
THE EDGE	Fox	TH-Star		0.5			1	0.5
GREAT SCOTT	Fox	Castle Rock	Castle Rock	0.5			1	0.5
BEN STILLER SHOW	Fox	HBO Independent		0.5			1	0.5
FLYING BLIND	Fox	Viacom Int'l		0.5			1	0.5
WHOOPS!	Fox	Wit-Thomas-Harris	Touchstone	0.5			1	0.5
Class of '96	Fox	Mandy Films	Empty Chair/subsid AB	1.0			1	1.0
Key West	Fox	Viacom Prods		1.0			1	1.0
The Simpsons	Fox	Fox/Gracie	Twentieth	0.5	1	0.5		
Beverly Hills 90210	Fox	Spelling		1.0			1	1.0
America's Most Wanted	Fox	STF Productions		1.0	1	1.0		
Sightings	Fox	Winkler/Daniel		0.5			1	0.5
Cops II	Fox	Fox TV Stations		0.5	1	0.5		
Cops 3	Fox	Fox TV Stations		0.5	1	0.5		
In Living Color	Fox	Fox	20th C Fox	0.5	1	0.5		
Roc	Fox	HBO Independent		0.5			1	0.5
Married With Children	Fox	Columbia	HBO Independent	0.5			1	0.5
Herman's Head	Fox	Wit-Thomas	Touchstone	0.5			1	0.5
				14.0	8.0	3.5	16.0	10.5
MAD ABOUT YOU	NBC	Tr-Star TV	TrStar TV	0.5			1	0.5
RHYTHM & BLUES	NBC	Fox	Twentieth	0.5	1	0.5		
FINAL APPEAL	NBC	Cosgrove-Murri		0.5			1	0.5
WHAT HAPPENED?	NBC	Hearst	Hearst	0.5			1	0.5
THE ROUND TABLE	NBC	Spelling Prods.		1.0			1	1.0
HERE AND NOW	NBC	NBC Prods		0.5	1	0.5		
OUT ALL NIGHT	NBC	NBC Prods	NBC	0.5	1	0.5		
SECRET SERVICE	NBC	NBC Prods		1.0	1	1.0		
I WITNESS VIDEO	NBC	NBC News	NBC	1.0	1	1.0		
Fresh Prince	NBC	NBC Prods.		0.5	1	0.5		
Blossom	NBC	Wit-Thomas-Harris	Touchstone TV	0.5			1	0.5
Quantum Leap	NBC	Universal	Universal City Studios	1.0			1	1.0
Reasonable Doubts	NBC	Loftmar	Loftmar	1.0			1	1.0
Dateline NBC-Tuesday	NBC	NBC News	NBC	1.0	1	1.0		
Unsubbed Mysteries	NBC	Cosgrove-Murri	Cosgrove-Murri	1.0			1	1.0
Seinfeld	NBC	Castle Rock	Castle Rock	0.5			1	0.5
Law & Order	NBC	Universal	Universal City Studios	1.0			1	1.0
A Different World	NBC	Carsey-Werner	Carsey-Werner	0.5			1	0.5
Cheers	NBC	Paramount	Paramount	0.5			1	0.5
12/10/2002								

1992-1993 Network Primetime TV Ownership Excluding Theatrical/MOW

TITLE	NET	Production Co	Copyright Holder	Length	Networks		Produced By	
					Or		An Independent	
					Affiliated Producers		Producer	
				Hrs/wk	# Of Shows	# Of Hrs/Wk	# Of Shows	# Of Hrs/Wk
Wings	NBC	Paramount	Paramount	0.5			1	0.5
LA Law	NBC	Fox	20th C Fox	1.0	1	1.0		
I'll Fly Away	NBC	Lorimar/Brand & Falsey	Lorimar	1.0			1	1.0
Empty Nest	NBC	Witt-Thomas-Harris	Touchstone TV	0.5			1	0.5
Nurses	NBC	Witt-Thomas-Harris	Touchstone TV	0.5			1	0.5
Sisters	NBC	Lorimar	Lorimar	1.0			1	1.0
Total	NBC			18.0	8.0	6.0	17.0	12.0
Percentage	NBC					33.3%		66.7%
TOTAL FOR ALL NETS				70.0	28.0	22.5	69.0	47.5
PERCENTAGE FOR ALL NETS						32.1%		67.9%
DEFINITIONS:								
Networks or Affiliated Producer : Network ownership or ownership by production entity affiliated with Fox								
Independent Producers: Ownership by any studio not affiliated with a broadcast network or independent production company.								